Kum Hui Bing v Premium Plaza Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO D-28NCC-22–01 OF 2012
MAH WENG KWAI J
26 MARCH 2012

Civil Procedure — Striking out — Application for — Application to strike out winding up proceedings — Whether plain and obvious case — Rules of the High Court 1980 O 18 r 19(1)(a), (b), (c) & (d)

Companies and Corporations — Insolvency — Winding up — Application to strike out winding up proceedings — Proof of solvency by production of accounts — Whether proof of solvency only to be considered during hearing of winding up petition and not during hearing of striking out application

Negotiable Instruments — Bills of exchange — Bill of exchange dishonoured upon presentment — Respondent stopping payment on cheque on grounds of breach of contract by petitioner — Whether dishonour of cheque by non-payment — Presumption of value and good faith — Immediate right of recourse against drawer — Whether holder may immediately bring winding up proceedings against drawer — Bills of Exchange Act 1949 (Rev 1978) ss 27, 30 & 47(1) & (2)

On 20 December 2010 Seasons Corridor Sdn Bhd ('Seasons Corridor') entered into a share purchase agreement ('SPA') to purchase the petitioner's shares in Times Academy Sdn Bhd. On 19 October 2011, the respondent issued a cheque for the sum of RM1m to the petitioner being payment under the SPA. However the respondent stopped payment on the cheque when the respondent was informed by Seasons Corridor that the petitioner had breached numerous terms and conditions of the share purchase agreement. The petitioner contended that she was the holder of the cheque for value and that the respondent had no legal basis to stop payment on the cheque. The petitioner then issued a winding up petition ('the petition') to wind up the respondent. The respondent applied under O 18 r 19(1)(a), (b), (c) and/or (d) of the Rules of the High Court 1980 ('RHC') and/or under the inherent jurisdiction of the court pursuant to O 92 r 4 of the RHC to strike out the petition. The respondent claimed that it was the owner of a shopping mall valued at about RM57m and that it was a going concern and was solvent.

Held, dismissing the application with costs:

(1) This was not a plain and obvious case to be struck out under the principle

laid down in the case of *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7 (see para 11).

(2) When the respondent stopped payment on the cheque there was a dishonour of the cheque by non-payment in terms of s 47(1) of the Bills of Exchange Act 1949 ('the Act') (see para 16).

(3) Pursuant to s 47(2) of the Act, when a bill is dishonoured by non-payment, an immediate right of recourse against the respondent as the drawer accrues to the petitioner as the holder. With an immediate right of recourse accruing against the respondent, the petitioner has the discretion to decide whether to proceed with a winding up petition on an alleged debt or to commence legal proceedings against the respondent by filing a suit to firstly secure a judgment on the cheque (see paras 19–20).

(4) Although there was no privity of contract between the respondent and the petitioner and no valuable consideration was given within the provisions of s 27 of the Act, the court could not ignore the presumption of value and good faith under s 30 of the Act. By virtue of s 30, the respondent had prima facie become a party to the bill for value (see paras 22 & 24).

(5) The claim of solvency by the respondent by the production of its accounts before the court was a matter properly to be considered at the hearing of the winding up petition and it was premature for the court to consider this at this stage; *Rinol Malaysia Sdn Bhd v MFRP Marketing Sdn Bhd* [2003] MLJU 448; [2003] 4 CLJ 142 reffered (see para 30).

[Bahasa Malaysia summary

Pada 20 Disember 2010 Seasons Corridor Sdn Bhd ('Seasons Corridor') memasuki perjanjian pembelian saham ('PPS') untuk membeli saham pempetisyen dalam Times Academy Sdn Bhd. Pada 19 Oktober 2011, responden mengeluarkan cek untuk sejumlah RM1 juta kepada pempetisyen sebagai bayaran di bawah PPS. Walau bagaimanapun responden memberhentikan bayaran cek tersebut apabila responden diberitahu oleh Seasons Corridor bahawa pempetisyen telah memungkiri beberapa terma dan syarat perjanjian pembelian saham. Pempetisyen berhujah bahawa dia adalah pemegang cek untuk nilai tersebut dan bahawa responden tidak mempunyai asas dari segi undang-undang untuk memberhentikan bayaran ke atas cek tersebut. Pempetisyen kemudiannya mengeluarkan petisyen penggulangan ('petisyen tersebut') untuk menggulung responden. Responden memohon di bawah A 18 k 19(1)(a), (b), (c) dan/atau (d) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dan/atau di bawah bidang kuasa inherens mahkamah A 92 k 4 KMT untuk membatalkan petisyen tersebut. Responden mendakwa

bahawa ia adalah pemilik pusat membeli belah yang bernilai lebih kurang RM57 juta dan ia satu usaha berterusan dan adalah solven.

Diputuskan, menolak permohonan dengan kos:

(1) Ini bukan satu kes yang jelas untuk dibatalkan di bawah prinsip yang ditetapkan di dalam kes *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7 (lihat perenggan 11).

(2) Apabila responden memberhentikan bayaran ke atas cek tersebut terdapat kemungkaran cek atas sebab tidak membayar mengikut s 47(1) Akta Bil Pertukaran 1949 ('Akta') (lihat perenggan 16).

(3) Berikutan s 47(2) Akta, apabila bil tak layan kerana tidak dibayar, hak segera bertindak terhadap responden sebagai pembayar terakru kepada pempetisyen sebagai pemegang. Dengan hak segera bertindak terakru terhadap responden, pempetisyen mempunyai budi bicara untuk memutuskan sama ada untuk meneruskan dengan petisyen penggulungan atas dakwaan hutang atau untuk memulakan prosiding undang-undang terhadap responden dengan memfailkan tindakan untuk mendapatkan penghakiman atas cek tersebut (lihat perenggan 19–20).

(4) Walaupun tidak terdapat priviti kontrak di antara responden dan pempetisyen dan tiada balasan bernilai diberikan dalam peruntukan s 27 Akta, mahkamah tidak dapat mengendahkan anggapan nilai dan suci hati di bawah s 30 Akta. Berdasarkan s 30, responden telah prima facie menjadi pihak kepada bil untuk nilai (lihat perenggan 22 & 24).

(5) Dakwaan solven oleh responden dengan pengemukaan akaun-akaunnya di hadapan mahkamah adalah perkara yang hendak dipertimbangkan secara betul di perbicaraan petisyen penggulungan dan adalah pra matang untuk mahkamah untuk mempertimbangkannya pada peringkat ini; *Rinol Malaysia Sdn Bhd v MFRP Marketing Sdn Bhd* [2003] MLJU 448; [2003] 4 CLJ 142 dirujuk (lihat perenggan 30).]

Notes

For cases on application for striking out, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 7478–17481.

Cases referred to

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corp Bhd [1993] 3 MLJ 36; [1993] 4 CLJ 7, SC (folld)

Datuk Ir Che Amran Mohd Yusoff v Yayasan Melaka & Ors [2003] MLJU 7; [2003] 1 CLJ 767, HC (refd)

Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281, CA (folld)

Rinol Malaysia Sdn Bhd v MFRP Marketing Sdn Bhd [2003] MLJU 448; [2003] 4 CLJ 142, HC (refd)
Sri Hartamas Development Sdn Bhd v MBF Finance Bhd [1992] 1 MLJ 313; [1992] 1 CLJ 637, SC (refd)

Legislation referred to

Bills of Exchange Act 1949 ss 27, 30, 47, 47(1), (1)(a), (2), 73(1), 218, 218(2)(a)
Companies Act 1965 s 218
Rules of the High Court 1980 O 18 r 19(1)(a), (b), (c), (d), O 92 r 4

A Onn (Onn & Partners) for the petitioner.
Edwin Lim (Edwin Lim Suren & Soh) for the respondent.

Mah Weng Kwai J:

BACKGROUND FACTS

[1] On 4 November 2011 the petitioner issued a s 218 of the Companies Act 1965 Notice to the respondent in respect of a sum of RM1m said to be due and owing.

[2] As the respondent did not pay the sum of RM1m or any part thereof to the petitioner within 21 days of the notice, the petitioner on 10 January 2012 filed the winding up petition (the petition) to wind up the respondent.

[3] On the 20 January 2012 the respondent obtained an ex-parte order for an interim injunction against the petitioner from proceeding with the petition.

[4] On 20 january 2012 the respondent also filed an application under O 18 r 19(1)(a) or (b) and/or (c) and/or (d) of the Rules of the High Court 1980 (RHC) and/or under the inherent jurisdiction of the court pursuant to O 92 r 4 of the RHC to strike out the petition. As the respondent had filed an affidavit in support (encl 5A) counsel for the respondent informed the court that the respondent would not be relying on O18 r 19(1)(a).

GROUNDS IN SUPPORT OF THE STRIKING OUT APPLICATION

[5] The respondent relied on the following grounds:

(a) that the petition is frivolous, vexatious and an abuse of process of court; and

(b) that the petitioner does not have a cause of action as the respondent does not owe any money to the petitioner.

BRIEF FACTS LEADING TO THE PETITION

[6] On 20 December 2010 Seasons Corridor Sdn Bhd ('Seasons Corridor') entered into a share purchase agreement to purchase the petitioner's shares in Times Academy Sdn Bhd.

[7] On 19 October 2011, Seasons Corridor requested for a friendly loan of RM1m from the respondent to be paid to the petitioner (encl 5A – exh OKK2).

[8] Pursuant to the request, the respondent issued a cheque for the sum of RM1m to the petitioner.

[9] However the respondent stopped payment on the cheque when the respondent was informed by Seasons Corridor that the petitioner had breached numerous terms and conditions of the share purchase agreement.

[10] The petitioner contended that she is the holder of the cheque for value and that the respondent has no legal basis to stop payment on the cheque which was given at the request of Seasons Corridor, the purchaser of the shares, towards part payment of the share purchase agreement.

DECISION OF THE COURT

[11] Upon reading the summons in chambers (encl 5) and the affidavit in support (encl 4) and upon reading the submissions of counsel for the respondent and the petitioner and upon hearing the oral submissions of counsel aforesaid, the court held that this was not a plain and obvious case to be struck out under the principle laid down in the case of *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7 and accordingly the application was dismissed on 23 February 2012.

GROUNDS OF DECISION

Whether the petitioner has a cause of action

[12] The court accepted as of fact that prior to the issuance of the cheque by the respondent to the petitioner, the respondent had no dealings whatsoever with the petitioner.

[13] The respondent is not a party to the share purchase agreement entered into between the petitioner and Seasons Corridor. As such there is no privity of contract between the respondent and the petitioner.

[14] However, the court was not prepared to hold in law that the petitioner has no cause of action whatsoever against the respondent on the basis that there was no consideration given in respect of the cheque as contended by counsel for the respondent and thus the respondent does not owe the petitioner any money.

[15] Counsel for the respondent in his submission relied on s 47(1) of the Bills of Exchange Act 1949 ('the Act') to say that as payment on the cheque was stopped by the respondent due to the alleged breaches of the share purchase agreement by the petitioner, this was a case of non payment and not of a dishonour of a cheque. Counsel also submitted that s 47 must be read with s 27 of the Act that there must be valuable consideration for the cheque before the petitioner can sue on it and that there is no proof of a debt in this case.

[16] With respect, the court cannot agree with the contentions of counsel for the respondent. The court is of the view that when the respondent stopped payment on the cheque there was a dishonour of the cheque by non-payment in terms of s 47(1) of the Act which provides:

> 47. Dishonour by non-payment
>
> (1) A bill is dishonoured by non-payment —
>
> (a) when it is duly presented for payment and payment is refused or cannot be obtained; or
>
> (b) when presentment is excused and the bill is overpaid and unpaid.

[17] In the present case, the petitioner could not obtain payment on the cheque and this would amount to a dishonour by non-payment within the provisions of s 47(1)(a) of the Act.

[18] Section 73(1) of the Act defines a cheque as a bill of exchange drawn on a banker payable on demand.

[19] Further, pursuant to s 47(2) when a bill is dishonoured by non-payment, an immediate right of recourse against the respondent as the drawer accrues to the petitioner as the holder.

[20] With an immediate right of recourse accruing against the respondent, the petitioner has the discretion to decide whether to proceed with a winding up petition on an alleged debt or to commence legal proceedings against the respondent by filing a suit to firstly secure a judgment on the cheque.

[21] Here, the petitioner decided to file a winding up petition. In the face of the petition, the court had to determine whether the petitioner has a cause of

action to sustain the petition or whether the respondent ought to succeed in striking out the petition on the ground that there is no valuable consideration given.

[22] Granted, in this case there appears to be no privity of contract between the respondent and the petitioner and that no valuable consideration was given within the provisions of s 27 of the Act, but the court cannot ignore the presumption of value and good faith under s 30 of the Act.

[23] Section 30 provides:

> (1) Every party whose signature appears on a bill is prima facie deemed to have become a party thereto *for value*.

[24] In the present case, there is no denial by the respondent that the cheque was issued by it. In fact, the cheque was issued at the request of Seasons Corridor as a friendly loan and given to the petitioner freely and voluntarily and without conditions towards part payment of the purchase of the petitioner's shares by Seasons Corridor. By virtue of s 30, the respondent has prima facie become a party to the bill for value.

[25] No doubt s 30 is a deeming provision and raises a presumption which can be rebutted. The court is of the view that in recognising this rebuttable presumption, it cannot be said that the petitioner has no cause of action against the respondent and the petition ought to be struck out. It is a triable issue and it is up to the petitioner to prove at the hearing of the petition, the impact the acceptance of the cheque may have had on the share purchase agreement. At this stage it cannot be gain said that the petition is frivolous, vexatious or an abuse of the process of court.

[26] While it was held by the court that prior to the issuance of the cheque by the respondent, the respondent had no dealings whatsoever with the petitioner, the court noted that the share purchase agreement was signed by one Ong Kok Keng for and on behalf of Seasons Corridor (encl 4, exh OKK3 – execution page) and that the affidavit in support (encl 4) to strike out the petition was also signed by the said Ong Kok Keng for and on behalf of the respondent. With this in mind, it will be incorrect to say that the respondent was a total stranger to the share purchase agreement between the respondent and the petitioner. There is obviously a connection between the respondent and Seasons Corridor insofar as the purchase of the shares from the petitioner is concerned.

Whether the respondent is solvent

[27] The respondent in its affidavit in support deposed that it is the legal and

registered owner of a shopping mall known as 'Kuantan Parade' in Kuantan, Pahang valued at about RM57m and that the respondent is a going concern and is solvent. Counsel for the respondent contended that the petition is clearly an abuse of process intending to harass and pressure the respondent to pay a debt that does not even exist.

[28] The positive assertions of the respondent were not denied or challenged by the petitioner as no affidavit in reply was filed by the petitioner. Following the decision in *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 the court agreed with counsel for the respondent that the petitioner was deemed to admit all the statements of fact contained in encl 4.

[29] Counsel for the petitioner submitted that the petitioner was relying on his earlier affidavit in reply filed to oppose the application for injunction, in reply to encl 4. However, a perusal of the record showed that no *notis niat untuk menggunakan affidavit* was filed by the petitioner nor served on the respondent.

[30] Notwithstanding that the positive assertions of the respondent were not denied or controverted by the petitioner on affidavit, the court was of the view that the claim of solvency by the respondent by the production of its accounts before the court is 'a matter properly to be considered at the hearing of the winding up petition and that it is premature for this court to consider this at this stage' as was held by Zaleha Zahari J (now JCA) in the case of *Rinol Malaysia Sdn Bhd v MFRP Marketing Sdn Bhd* [2003] MLJU 448; [2003] 4 CLJ 142 at p 151.

[31] Her Ladyship in her judgment in *Rinol Malaysia Sdn Bhd*, on the issue of solvency referred to the Supreme Court case of *Sri Hartamas Development Sdn Bhd v MBf Finance Bhd* [1992] 1 MLJ 313; [1992] 1 CLJ 637 where it was held:

> the presumption of insolvency arises when the requirements of s 218(2)(a) of the Act have been satisfied and it is for the company to prove that it is able to pay its debts. In dealing with 'commercial insolvency', that is of a company being unable to meet its current demands upon it, we would respectfully follow the Privy Council in the *Malayan Plant* case and cite the following observations from *Buckley* on Companies Act (13th Ed) at p 460:
>
> In such a case it is useless to say that if its assets are realised there will be ample to pay twenty shillings in the pound. It may have wealth locked up in investments not presently realisable; but although this may be so, yet if it has no assets available to meet its current liabilities it is commercially insolvent and may be wound up.

[32] Thus in this case the issue of the respondent, being not just solvent but 'commercially solvent', should be determined at the hearing of the petition. It

will be up to the winding up court to consider all of the evidence presented before it and to determine whether it should exercise its discretion to order a winding up of the respondent or otherwise.

[33] Counsel for the respondent was at pains to impress the court that the respondent is solvent as it is 'the legal and registered owner of the shopping mall valued at about RM57m. However, a perusal of the valuation report by Colliers Jordan Lee & Jaafar (encl 4 — exh OKK4) clearly shows that the owner of the unsold units at the mall is Pasdec Realty Sdn Bhd (receiver and manager appointed) and not the respondent, as at 8 March 2006, the date of valuation.

[34] Further, insofar as the ownership of the land valued at about RM5.5m on which the mall is located, is concerned, there is no dispute that it is owned by the respondent. However, a perusal of the title deed (encl 4 — exh OKK5) clearly shows that a caveat had been lodged on the title on 24 May 2006 and that the land has been charged to CIMB Islamic Bank Bhd on 12 October 2009. As no further evidence was adduced by the respondent to elaborate on the existence of the caveat and no statements of accounts were exhibited to show the extent of the indebtedness by the respondent to CIMB Islamic Bank Bhd, it cannot be said that the respondent has clearly shown that it is prima facie commercially solvent.

CONCLUSION

[35] The issue before the court is not whether the petitioner ought to file a claim against Seasons Corridor for the debt of RM1m but whether the petitioner has a cause of action to file the petition against the respondent. By issuing the cheque to the petitioner, the respondent had held out to the petitioner that it would make good payment to the petitioner on behalf of Seasons Corridor.

[36] The use of cheques is a daily feature in the ordinary course of business in the commercial world and its usefulness ought to be encouraged. Cheques remain a convenient and flexible means of payment and its use promotes business efficacy and efficient financial transactions. There is also a general perception in the business community that issuing a cheque is a safer mode of payment compared with electronic transfers. Payments through the issuance of cheques ought generally to be honoured and payments should only be countermanded for valid reasons.

[37] The issue of whether the respondent being the drawer of the cheque can give notice to its bank to stop payment on the cheque on being informed of the alleged breaches by the petitioner by its borrower Seasons Corridor is an issue

to be canvassed at the hearing of the petition and is an insufficient ground for the court to strike out the petition at this stage.

[38] When exercising its powers to strike out under O 18 r 19 of the RHC 1980, the Supreme Court in the case of *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corp Bhd* per Mohamed Dzaiddin bin Hj Abdullah SCJ (as he then was) held as follows:

> The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the Rules of the High Court are well settled. It is only in *plain and obvious cases* that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck v Wilkinson* [1899] 1 QB 86, at p 91), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it *'obviously unsustainable'* (*Attorney-General of Duchy of Lancaster v L & NW Ry Co* [1892] 3 Ch 274, (CA)). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (*Wenlock v Moloney* [1965] 1 WLR 1238; [1965] 2 All ER 871 (CA)). (Emphasis added.)

[39] The application of O 18 r 19 of the RHC 1980 was further explained by Low Hop Bing J (now JCA) in the case of *Datuk Ir Che Amran Mohd Yusoff v Yayasan Melaka & Ors* [2003] MLJU 7; [2003] 1 CLJ 767 at p 775 where His Lordship held:

> *Striking Out Only In Plain And Obvious Cases*
>
> It has been stated ever so often by our courts that it is only in absolutely plain and obvious cases that a plaintiff's claim or action or a party's pleadings would be struck out under any of the limbs of O 18 r 19(1): See eg *Roslan bin Abdullah v New Zealand Insurance Co Ltd* [1981] 2 MLJ 324 (FC).
>
> The weakness or demerits of the plaintiff's action or a party's pleadings cannot ipso facto be a ground for striking out but it has to be proved, established or demonstrated that the specific requirements and terms contained in O 18 r 19(1)(b), (c) or (d) has been satisfied. In the instant case, there are *serious conflicts or controversies* in the multifarious affidavits filed by the parties herein. I am neither bound nor prepared to resolve these conflicts or controversies at this premature affidavit stage, but would only resolve them by way of mature consideration of *viva voce evidence* adduced at a full hearing of the action herein: *Kantan Jaya Marine Services (Pg) Sdn Bhd v RHB Bank Bhd* [2001] 3 CLJ 738; *Hi Heng Tuong Alphonsus v Lok Min Wah & Ors* [1995] 4 CLJ 350 (HC). (Emphasis added.)

[40] In the result the application was dismissed with costs.

Application dismissed with costs.

Reported by Kanesh Sundrum